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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 1034

JESSE L. PEARL AND MASSACHUSETTS BONDING AND INSURANCE COMPANY,

Petitioners,

vs.

THE COUNTY OF GARFIELD, NEBRASKA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA AND BRIEF IN SUPPORT THEREOF.

J. A. C. KENNEDY,
YALE C. HOLLAND,
G. L. DELACY,
B. F. ROSE,
Counsel for Petitioners.

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vs.

THE COUNTY OF GARFIELD, NEBRASKA.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Jesse L. Pearl and Massachusetts Bonding and Insurance Company respectfully shows to this Court—

(A) Summary Statement of the Matter Involved.

This is an action brought on a County Treasurer's bond by respondent in the District Court of Garfield County, Nebraska, against your petitioners, Jesse L. Pearl, formerly County Treasurer of Garfield County, Nebraska, and his bondsman, Massachusetts Bonding and Insurance Company.

The County seeks to recover County funds deposited in two banks by the said County Treasurer, pursuant to order of the County Board, which banks subsequently failed. The County seeks to hold the Treasurer as an insurer.

The statutes involved are a portion of the Depository Law of the State of Nebraska. Specifically they are Sections 77-2506, 77-2508, 77-2513, 77-2511 and 77-2512, Compiled Statutes of Nebraska, 1929.

Section 77-2506 provides that the County Treasurer must deposit the county funds in banks located in the County. It further provides that any such bank may apply to the County Board for designation as a Depository, and that the County Board shall act on such application and approve the Depository Bond of the applicant bank. The Treasurer is explicitly forbidden to deposit money "in any bank or banks other than such as may have been so selected by the County Board for such purpose."

Section 77-2508 provides that for the security of the funds so deposited "the County Treasurer shall require all such depositories to give bond for the safekeeping and payment of such deposits * * * which bonds * * * shall * * * be approved by the County Board."

This section provides also for security which may be given by a depository bank in lieu of bond, describing the various kinds and classes of securities which may be used for that purpose.

Section 77-2513 provides that "no Treasurer shall be liable on his bond for money on deposit in bank under and by direction of the proper legal authority, if the bank has given bond."

Section 77-2511 provides that if the County Treasurer removes the County's money from any Depository so selected, he shall be deemed guilty of a felony and punishable by a fine of not to exceed $5000.00 or by imprisonment in the penitentiary for two years. (The money in question was

already in these two banks. After they had been designated as Depositories the Treasurer could not have taken the money out without violating the foregoing section.)

There were only two banks in the County (R. 15). Neither of these banks could furnish a Depository bond, nor could either of them furnish substitute security of the kind specified in the statute (R. 14-15). Both offered to deposit with the County commercial paper in lieu of a Depository bond. The County Board accepted their propositions and ordered the County Treasurer to deposit the County funds in these two banks (R. 15-16). The Treasurer obeyed the order (R. 16). It was not possible, under the circumstances, for him to "require" either of these banks to give bond. It was likewise not possible for him to deposit the money in any other banks in that County, because there were none. Nor was it possible for him to deposit the money in a bank outside of the County (or to keep it in a strong box) without violating the statute and the order of the County Board.

The Supreme Court of Nebraska held that the County Treasurer was an insurer and that he obeyed the order of the County Board at his peril.

(B) Proceedings Below.

Your petitioners demurred to the County's Amended Petition (R. 12). The Demurrers were overruled. The County demurred to Petitioners' Amended Answers. The Demurrer was sustained (R. 26), and judgment was entered in favor of the County in the sum of $20,751.69 as against Jesse L. Pearl, and $20,000.00 as against the Bonding Company, with interest at 6% from January 3, 1935 (R. 28-29).

Defendants appealed to the Supreme Court of Nebraska which Court sustained the judgment of the Trial Court in an opinion filed January 10, 1941, holding, in substance,

that a Treasurer is relieved from liability only where his deposits have been made in a bank designated by the County Board and which has given bond; that as to any deposit made where the bank has not given bond he is an insurer and absolutely liable therefor, even though the County Board may have ordered him to make the deposit, and even though he could not have made the deposit elsewhere without violating the statutes (R. 31-39).

Your petitioners filed a Motion for Rehearing upon the grounds, amongst others, that as construed by the Court, Sections 77-2506, 77-2508 and 77-2513 were confiscatory and violated the due process and contract clauses of the Federal Constitution (R. 39).

On March 1, 1941, the Motion for Rehearing was overruled (R. 67).

(C) Questions Presented.

1. A statute which (as construed by the Court), makes a County Treasurer an absolute insurer and holds him absolutely liable for the moneys of the County when all control over the same is taken out of his hands and vested in the County Board, confiscates his property, takes it away from him by processes over which he has no control, and is in contravention of the Fifth and Fourteenth Amendments to the Constitution of the United States.

2. A statute which (as construed by the Court), makes a County Treasurer liable on his bond (conditioned upon the performance by him of the acts required of him by law, where his only failure to comply with the law is his act of obeying an order of the Governing Body, disobedience of which order would in and of itself have been a violation of the same law, disregards the obligation of the bond contract and is in contravention of Section 10, Article 1, of the Constitution of the United States.

(D) Jurisdictional Statement.

DATE OF JUDGMENT SOUGHT TO BE REVIEWED.

Judgment of the Trial Court was affirmed by the Supreme Court of Nebraska on January 10, 1941 (R. 31-39). The Motion for Rehearing was filed January 25, 1941 (R. 39).

The Motion for Rehearing was overruled on the 1st day of March, 1941 (R. 67).

STATUTORY PROVISIONS BELIEVED TO SUSTAIN JURISDICTION.

This Court has jurisdiction to review the judgment in question under Section 237(a) of the Act of February 13, 1925, Chapter 229, 43 Stats. 936; Title 28, Section 344(a) U. S. C. A., wherein it is provided that a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had may be reviewed where is drawn in question the validity of any statute of any State on the ground of its being repugnant to the Constitution of the United States and the decision is in favor of its validity.

This Court also has jurisdiction to review the judgment in question under Section 237(b) of the Act of February 13, 1925, Chapter 229, 43 Stats. 936; Section 344(b), Title 28, U. S. C. A., wherein it is provided that it shall be competent for the Supreme Court by certiorari to require that there be certified to it for review and determination any cause where any final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution of the United States, or where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution of the United States.

STATUTES OF THE STATE, VALIDITY OF WHICH IS INVOLVED.

These statutes have been referred to in the Summary Statement at the head of this Petition.

(E) Time, Method and Manner of Raising the Federal Questions Here Involved.

The Federal questions here sought to be reviewed were raised after the Supreme Court of Nebraska in its opinion had so construed the statutes here involved as to bring them in conflict with the due process and contract clauses of the Constitution of the United States (R. 39).

The method of raising them was by motion for an order vacating and setting aside the decision, opinion and judgment and granting a rehearing for the reason that the construction placed by the Court upon the statutes here involved was in contravention of the Fifth and Fourteenth Amendments and Section 10, Article 1, of the Constitution of the United States. (Paragraphs VI and VII of the Motion for Rehearing; R. 40-41.)

(F) Reasons Relied On for the Allowance of the Writ.

1. The Supreme Court of Nebraska has decided a Federal question of substance not heretofore determined by this Court, namely, the two questions hereinbefore set out under the heading of "Questions Presented", ignoring conflicting decisions of other states.

2. There is here involved the right of a public treasurer to claim the protection of the due process clause of the Federal Constitution in order to avoid having his property confiscated by the construction placed on certain sections of the Depository Law by the Nebraska Supreme Court.

3. There is here involved the right of a public treasurer to claim the protection of the contract clause of the Federal

Constitution where his bond is conditioned upon the performance by him of the acts required of him by law and he fails in that respect only in the sense that he obeys an order of the Governing Body, disobedience of which would, in and of itself, have been a violation of the law.

4. When a Depository Law is so construed that no matter which way a public treasurer turns in a given situation his decision will be wrong, it is inconceivable that the Federal Constitution will not protect him against the confiscation of his property on the theory that he is an insurer. Public treasurers and Governing Bodies everywhere are interested in this question, and the law with reference to the liability of public treasurers needs to be clarified by an expression from this Court as to how much protection the due process and contract clauses of the Federal Constitution give a Treasurer in this situation.

(G) Statement of the Grounds Upon Which It Is Contended the Questions Involved Are Substantial.

The reasons assigned above partly answer this question. At common law public treasurers were insurers. Legislators have recognized that Treasurers should not be asked to accept that strict responsibility under present day conditions and Depository Laws relieving public treasurers of this strict liability have everywhere been enacted. Now the question arises as to what a County Treasurer can do to protect himself when the statute says that he must put the County funds in a bank designated by the County Board, that he must require the bank to give a Depository bond, but the bank can't furnish a bond, and the County Board nevertheless orders the Treasurer to accept such security as the bank can furnish and to put the money in the bank regardless. Where is the responsibility in such a situation? Is the Treasurer to be held as an insurer or should the

responsibility be placed upon the County Board? Has the Treasurer any protection in the Federal Constitution when the County attempts to hold him as an insurer and the State Supreme Court says it can be done? This is an important proposition in the law of public officers which, up to date, has not yet been decided by this Court and which it is believed merits the consideration of this Court, especially in view of the ignoring of the question by the Nebraska Supreme Court.

WHEREFORE, Your Petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of Nebraska, commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record of all proceedings in the case of *The County of Garfield, Nebraska, Plaintiff-Appellee* vs. *Jesse L. Pearl and The Massachusetts Bonding and Insurance Company,* Defendants-Appellants, General Number 30865, and that the said judgment of said Court may be reviewed by this Honorable Court and that Your Petitioners may have such other and further relief in the premises as to this Honorable Court may seem mete and just; and Your Petitioners will ever pray.

Respectfully submitted,

JESSE L. PEARL AND MASSACHUSETTS
BONDING AND INSURANCE COMPANY,

By J. A. C. KENNEDY,
YALE C. HOLLAND,
G. L. DELACY,
B. A. ROSE,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 1034

JESSE L. PEARL AND MASSACHUSETTS BONDING AND INSURANCE COMPANY,

Petitioners,

vs.

THE COUNTY OF GARFIELD, NEBRASKA.

BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI.

Opinion in the Court Below.

The opinion in the Supreme Court of Nebraska was filed January 10, 1941, and is reported in 295 N. W. 820. The Motion for Rehearing was overruled March 1, 1941, without further opinion (R. 67).

Jurisdiction.

This subject is fully covered in the Petition for the Writ.

Assignments of Error.

Assignment Number One.

The Supreme Court of Nebraska erred in overruling Paragraph VI of Your Petitioners Motion for Rehearing, and thereby refusing to hold that a statute which compels a

County Treasurer to deposit the money of the County in a bank designated by the County Board (under criminal penalty for failing to do so), and at the same time makes him an insurer of the deposit if the bank fails, contravenes the due process clause of the Federal Constitution.

Assignment Number Two.

The Supreme Court of Nebraska erred in overruling Paragraph VII of Your Petitioners Motion for Rehearing thereby, in effect, refusing to hold that the obligation of the bond contract (conditioned upon the doing by the Treasurer of the acts required of him by law), is impaired by a statute which makes the Treasurer liable for obeying an order of the County Board, legal or illegal, which order the Treasurer is specifically required by the statutes to obey.

Assignment Number Three.

The Supreme Court of Nebraska erred in refusing to hold that where a County Treasurer violates the Depository Law if he obeys an order of the County Board and likewise violates it if he does not, the County Board, and not the County Treasurer, must accept the responsibility for the paradoxical situation.

Assignment Number Four.

The Supreme Court of Nebraska erred in holding that the legal assumption that the County Treasurer is an insurer and that those who deal with him are charged with notice of the limits of his powers, precludes consideration of the admitted fact that the County Board fraudulently concealed from the Bonding Company, when the treasurer's bond was before the Board for approval, the fact that it was about to accept, and to require the Treasurer to accept, illegal security, thus committing the Bonding Company to

liability which it would not have accepted if the facts had not been fraudulently concealed.

The Argument.

The situation that is reflected by the facts of this case is so unthinkable and so vitally tied in with the question of the liability of public Treasurers under Depository Laws that there should be some statement from this Court as to how it is affected by the due process and contract clauses of the Federal Constitution.

The Nebraska Depository Law requires the Treasurer to put the funds of the County in some bank located in the County. The Treasurer is given no voice in the selecting of the bank. That matter is left entirely with the County Board. The only duty imposed upon the Treasurer is the duty of "requiring" the selected bank to furnish a Depository bond. But suppose—as in this case—the designated bank cannot furnish a Depository bond. The Treasurer is given no authority to deposit the money in some other bank that *can* give a Depository bond. He is given no right to elect not to put the money in a bank at all. The statute specifically says that the money must be deposited *in a bank,* and in a bank *located in the County.* He could not in this instance deposit the money in some other bank located in the County for there was none. He could not deposit the money in any bank anywhere except in a bank designated by the County Board. He could deposit the money nowhere except in these two banks designated by the County Board—and neither of them could give a bond. His hands were tied by the very statute that was designed to relieve him of his common law liability as an insurer. He was literally helpless. He could not move in any direction without violating some provision of the Depository Act. He took the only logical course that was open to him. He obeyed the order of the County Board. Did he do so at his

peril? Do the due process and contract clauses of the Federal Constitution afford him and his bondsman any protection under the circumstances?

These questions in the last analysis can only be answered by this Court. They merit the attention of the court not only by reason of the injustice done in the instant case but because the question is one of public interest. The decision of the Nebraska Supreme Court places public Treasurers everywhere in the position of not knowing where they stand or which way to turn when governing bodies require them to place the public funds in depositories which either have not furnished or cannot furnish the security required by the Depository Act. When governing bodies are given the power to designate depository banks and when Treasurers can neither follow their commands nor refuse to follow them without breaking some portion of the Depository Law there must be some protection somewhere for the helpless officer. If that protection is to be found in the Federal Constitution it is important that that fact should be known. This Court and this Court alone can give the final answer.

In this particular case—and the situation is not unusual under Depository Laws—if the Treasurer had refused to deposit the County money in the banks designated by the County Board he would have exposed himself to prosecution under Section 77-2511 Compiled Statutes of Nebraska 1929, and would have been punishable by a fine of not to exceed $5000.00 or by imprisonment in the penitentiary for two years. He would likewise have been subject to prosecution under Section 77-2512 imposing a fine of up to $5000.00 for failing or refusing to perform an act required of him by the Depository Law.

For refusing to obey the order of the County Board he faced a criminal liability. For not refusing to obey the order of the County Board the Supreme Court of Nebraska held him liable in damages in the sum of $20,751.59.

There is something wrong with any statute which can bring about that result.

This, of course, is not the place to argue the merits of the case, but for the purpose of showing that there is authority for the contention that the result arrived at by the Nebraska Supreme Court offends against the due process and contract clauses and that the questions here presented deserve the consideration of this Court, we invite the Court's attention to two cases.

In the case of *McGee* v. *Brister,* 68 So. 77 (Miss. 1915), the constitutionality of the newly enacted Mississippi Depository Law was questioned because the law made the Treasurer the absolute insurer of moneys of the County regardless of the fact that all control over the same was taken out of his hands and vested in the County Board. To avoid holding the law unconstitutional the Supreme Court of the State said that the law did not make the County Treasurer an insurer when the money was deposited pursuant to the order of the County Board, hence it was not confiscatory. The Supreme Court of Nebraska, in the instant case, has held the opposite.

In *Board of Education* v. *Nelson,* 157 N. W. 664 (N. D.), in a similar situation, the Court pointed out that the Board and not the Treasurer had the disposition of the public funds, that it was the duty of the Treasurer to comply with the directions of the Board under pain of statutory penalties of imprisonment or forfeiture, or both; that an official cannot be under criminal liability for his refusal or neglect to comply with the requirements of the Board and at the same time be liable for loss of the funds where he has complied with its unequivocal order to deposit; and that it would amount to a confiscation of the private property of the County Treasurer and his bondsman to hold him liable for compliance with the order of the County

Board. But the Supreme Court of Nebraska holds to the contrary.

The decision of the Supreme Court of Nebraska muddles the situation everywhere. If a Treasurer cannot turn to the Federal Constitution under the circumstances, where can he go for protection? Mississippi and North Dakota have indicated that he can look to the due process and contract clauses but Nebraska ignores the argument.

We submit that the question is worthy of the consideration of this Court.

Respectfully submitted,

J. A. C. Kennedy,
Yale C. Holland,
G. L. DeLacy,
B. A. Rose,
Counsel for Petitioners.

Dated May 8, 1941.

In the

Supreme Court of the United States

OCTOBER TERM, 1940

No. [redacted]

JESSE L. PEARL and MASSACHUSETTS BONDING AND INSURANCE COMPANY,

vs.

THE COUNTY OF [redacted],

Petitioners,

Appellee.

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In the
Supreme Court of the United States

OCTOBER TERM, 1940

No. 1034

JESSE L. PEARL and MASSACHUSETTS BONDING AND INSURANCE COMPANY,
Petitioners,

vs.

THE COUNTY OF GARFIELD, NEBRASKA,
Respondent.

RESPONDENT'S BRIEF IN RESISTANCE TO APPLICATION OF PETITIONERS FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your respondent respectfully shows:

Petitioners in this case, Jesse L. Pearl and Massachusetts Bonding and Insurance Company, are asking that a writ of certiorari issue out of this Court to review a judgment of the Supreme Court of Nebraska entered in the above cause on January 10, 1941, affirming a judgment of the District Court of Garfield County, Nebraska, rendered in favor of respondent herein and against petitioners herein.

The case involves no question of national or sectional importance, nor any remote Federal question, nor

any inter-court conflict as to the law. It involves merely a question of Nebraska law, decided adversely to Petitioners by the Supreme Court of Nebraska.

Petitioners are merely seeking another hearing in this Court which is obviously for the purpose of rehearing only.

—o—

NATURE AND STATEMENT OF THE CASE

The facts are thus stated by the Supreme Court of Nebraska (Tr. p. 32):

> "This is an action by the county of Garfield against Jesse L. Pearl, its former treasurer, and his bondsmen, Massachusetts Bonding and Insurance Company, to recover funds on deposit in the First State Bank and Farmers Bank, Burwell, Nebraska, said banks having been found insolvent and taken over by, and placed under the control of, the banking department of the state of Nebraska, which funds the county alleged were deposited in said banks contrary to law.
>
> "The amended petition reflects the following: Jesse L. Pearl was elected treasurer of Garfield county November 4, 1930, for a term of four years, commencing January 8, 1931, and on January 5, 1931, Jesse L. Pearl, as principal, and defendant bonding company, as surety, executed an official bond in the sum of $20,000, which bond was delivered by Pearl to, and filed in the office of, the county clerk of Garfield county, and approved by the county commissioners of said county January 7, 1931. Subsequent to such date Pearl became the duly qualified and acting treasurer of the county. On January 7, 1931, the county commissioners met, and addressed to them appeared a request of the First State Bank and the Farmers Bank of Burwell to be designated as depositories for county funds. The First State Bank

offered as security for such deposits $25,000 in mortgage bonds, to charge $10 per thousand on such bonds, payable quarterly. The Farmers Bank made a like request, offering good bankable notes of the bank to the amount of $25,000. The county commissioners, by resolution, designated the two banks as county depositories, requiring them to comply with the law of Nebraska in securing such deposits, and, unless the banks furnished corporate surety bonds, that each was to deposit not less than $3,500 each of United States government or federal loan bonds, and that the balance of the security be such as provided by the laws of Nebraska, and instructed and authorized deposit in the banks of county funds equalling 80 per cent, of the bonds so deposited as security, and the full amount of corporate surety bonds if the same are furnished by the banks.

"On the same day the county board reconsidered the matter of county depository banks upon the suggestion and statement of the banks that they were not in a position to secure corporate surety bonds and did not have sufficient government or federal farm loan bonds to cover the full amount of the deposit. The banks offered to secure the county deposits, over and above the amount of government and federal farm loan bonds which the banks might have, by approved customers' notes. The county board, by resolution, accepted the offer and authorized the county treasurer to accept such notes as security for the surplus deposits, to be approved by the county treasurer and county clerk, and authorized and instructed the treasurer to deposit in said bank deposits to the amount of 80 per cent, of said notes, so furnished as security, and further directed that said banks be required to furnish sufficient security for all deposits necessary to be placed in said banks.

"The amended petition further alleged: Prior to January 3, 1935, both banks became financially involved to such extent that the department of banking

of this state took charge of them as receiver and liquidating agent. Some of the funds deposited by treasurer Pearl had not been withdrawn from the banks. January 3, 1935, Pearl's term of office expired, and it was his duty, under the law and the bond given, to pay over to his successor all moneys in his possession, to wit, $22,751.59, for which amount the plaintiff prayed judgment.

"The defendants demurred to the amended petition, and the demurrer was overruled. The defendants filed separate amended answers, which were practically identical in form. The substance of the pertinent allegations thereof follows: Upon the passage of the resolution (above referred to), the county treasurer had no other option except to obey the order of the county board and comply with the resolution, and, in so doing, deposited in the First State Bank, Burwell, county funds in the sum of $20,269.91, and in the Farmers Bank, Burwell, funds in the amount of $22,767.70, and thereupon said banks furnished the security called for by the resolution. The First State Bank deposited with the county clerk and county treasurer United States government bonds in the amount of $1,600, and customers' notes amounting to $28,000. The Farmers Bank deposited with the county clerk and county treasurer United States government bonds in the sum of $3,500 and customers' notes amounting to $27,000. Said customers' notes were checked and approved by the county treasurer and the county clerk and said collateral was shown to and accepted by the county commissioners. The amended answers further alleged, in substance, that defendant bonding company was not notified with reference to the deposit of customers' notes and had no knowledge of the deposits and was never given an opportunity to check, approve or pass upon said notes or their value or acceptability as security for said deposits; that it was the sole right, duty and responsibility of the board of county commissioners to select and approve the

depositories for county moneys and to approve the security offered by depositories for the safe-keeping of the deposits; that it was the duty of the county treasurer to comply with the resolution. The bonding company contends that it was not informed of the action of the board of county commissioners with respect to the securities to be furnished by the depositories designated; that, if it was the intention of the county commissioners to hold defendant bonding company liable for any shortage of the county treasurer, it was the duty of the plaintiff and the county commissioners to advise the defendant bonding company of said purpose and intention and give it the opportunity to retire from such transaction; that it was the duty of the plaintiff and county commissioners, after ordering and directing the county treasurer to take securities for deposit other than the kind of security referred to in the statute, to so advise the defendant bonding company and give it the opportunity either to be released from liability by reason thereof, or to elect to continue on the bond.

"It would appear from the pleadings that, in complying with the resolution naming the depositories, the treasurer, together with the county clerk, approved the securities and knew all of the conditions of the resolution. There is nothing in the pleadings to disclose that the county commissioners approved the customers' notes.

"The plaintiff demurred to the amended answers; the demurrer was sustained; motion for a new trial was overruled; defendant bonding company elected to stand upon its amended answer. From the court's ruling on the demurrer, defendants appealed to this court. This brings us to a consideration of the statutes involved and the conditions of the bond which the defendant bonding company furnished as surety.

"The bond provided: 'Now, the condition of the above obligation is such that if the above bounden Jesse Leland Pearl shall faithfully and impartially

perform and discharge the duties of said office according to law, and shall promptly account for and pay over all money, papers, or other property, that may come into his hands in virtue of his said office, to his successor in office, or to the person or party entitled thereto, then this obligation to be void, otherwise to be and to remain in full force and virtue.'

"Section 77-2506, Comp. St. 1929, provides in part: 'The county treasurer of each and every county in the State of Nebraska shall deposit for safe-keeping in the state, national or private banks doing business in the county, and of approved and reasonable standing, the amount of moneys in his hands collected and held by him as such county treasurer. * * * Any such bank located in the county may apply for the privilege of keeping such moneys upon the following conditions (the conditions need not be here stated): * * * It shall be the duty of the county board to act on such application or applications of any and all banks, state, national or private, as may ask for the privilege of becoming the depository of such moneys, as well as to approve the bonds of those selected incident to such relation, and the county treasurer shall not deposit such money or any part thereof in any bank or banks other than such as may have been so selected by the county board for such purposes.'

"Section 77-2508, Comp. St. 1929, provides in part: 'For the security of the funds so deposited under the provisions of this article the county treasurer shall require all such depositories to give bonds for the safe-keeping and payment of such deposits and the accretions thereof, which bond shall run to the people of the county, and be approved by the county board.' Said section further provides for the maximum deposit and for the substitution of securities, and securities to be given in lieu of the bond, but does not provide for the giving of securities such as were offered by the banks in the instant case and approved by the treasurer and county clerk; that is,

there is no provision for the acceptance of customers' notes as proper security furnished to permit a bank to be designated as a county depository.

"It is therefore obvious that in this instance the banks were not legal county depositories, as provided for by law, and the county board, in so designating such banks as depositories, exceeded its authority and went beyond the realm of the statute in such case; in other words, its acts were illegal, as were the acts of the treasurer. Other provisions of said section 77-2508 need not be referred to here.

"Section 77-2513, Comp. St. 1929, provides: 'No treasurer shall be liable on his bond for money on deposit in bank under and by direction of the proper legal authority if the bank has given bond.' "

Inasmuch as frequent reference is made by petitioners in the amended answers filed by them in the District Court of Garfield County to the proceedings of the county commissioners of Garfield County wherein the banks in question were designated as depositories, the same are set out in full below, as they appear of record, for the better understanding by this Court of the facts:

"Jan. 7, 1931 Burwell, Nebr.

The Board met as per adjournment with all members present. On motion the Board made the following resolution:

To the Honorable Board of County Commissioners, Garfield County, Nebraska.

Gentlemen: We request that the First State Bank of Burwell be designated a depository for Garfield County funds.

We offer as security for said deposit, $25,000.00 in market bonds and will charge $10.00 per thousand per annum on said bonds, payable quarterly, for securing such deposit.

Respectfully submitted,

The First State Bank, Burwell, Nebr.

By Jack C. Bristowe, President.

"*To the Honorable Board of County Commissioners, Garfield County, Nebraska.*

Gentlemen: We request that the Farmers Bank of Burwell, Nebraska, be designated as a depository for Garfield County Funds and offer as security for said deposit, good bankable notes of this bank to the amount of $25,000.00 and will charge $10.00 per thousand per annum, payable quarterly for securing such deposit.

Resp.
Farmers Bank, Burwell, Nebr.
A. I. Cram, President
By Geo. R. Froehlich, Cashier.

"The above application of the First State Bank and Farmers Bank of Burwell, Nebraska, were presented to the Board for consideration.

"It is therefore hereby resolved by this Board that the First State Bank of Burwell, Nebraska, and the Farmers Bank of Burwell, Nebraska, be each designated as county depositories, and they to comply with the laws of Nebraska in regard to securing of deposits and unless said Banks furnish corporate surety bonds that they are to deposit not less than $3500.00 of U. S. Government or Federal Farm Loan Bonds and the balance of the security to be such as is provided by the laws of the State of Nebraska. The County Treasurer of Garfield County, Nebraska, is hereby instructed and authorized to deposit in said banks the funds of Garfield County a sum equaling 80% of the bonds so deposited as security and the full amount of corporate surety bonds if the same are furnished by said Banks. It being the intention of this resolution that said Banks shall be county depositories and they shall comply with the depository law as to paying interest and furnishing security and the County Treasurer is to make his deposits therein accordingly.

County Commissioners C. F. Clark
F. A. Downey
J. D. Wittsche

"The matter of the County Depository Banks coming on for further consideration before the Board and upon the suggestions and statement of said depositories that they are not in position at this time to secure corporate surety bonds and that they do not have sufficient Government or Federal Farm Loan Bonds to cover the full amount of deposit, which it will be necessary to place in said Banks, and upon the offer of said Banks to secure the county deposits, over and above what Government and Federal Farm Loan Bonds they may have, by approved customers' notes and it appearing to the board that for the present there is no other way to procure a County depository the County Treasurer of Garfield County, Nebraska, is hereby authorized to accept such notes as security, for the surplus, said notes to be approved by the County Treasurer and County Clerk and deposited with the County Clerk, and the County Treasurer of Garfield County, is hereby authorized and instructed to deposit in said First State Bank of Burwell, Nebraska, and said Farmers Bank of Burwell, Nebraska, deposits to the amount of 80% of said notes so furnished as security for all deposits necessary to be placed in said banks.

"This provision to customers' notes to be and remain in force until the further action of this Board.

"Resolution adopted.

C. F. Clark, F. A. Downey, J. D. Wittsche
County Commissioners.

"The Bond of Jesse L. Pearl was approved by the County Board.

"The balance of the day was spent in checking the Treasurer's books.

"The Board adjourned.

"C. F. Clark, Chairman W. T. Anderson, Clerk
"Filed Jan. 7, 1931
"W. T. Anderson, Clerk."

ISSUES AS DISCLOSED BY THE PLEADINGS

It will be observed that:

(1) Both petitioners expressly admitted the execution of the bond sued on in their amended answers (Tr. p. 14 and p. 20, Par. II);

(2) Neither petitioner anywhere alleges any mistakes whatever in the terms of the bond, according to which "the condition of the above is such that if the above bounden Jesse Leland Pearl shall faithfully and impartially perform and discharge the duties of said office *according to law,* and shall promptly account for and pay over all money, papers, or other property, that may come into his hands in virtue of his said office, to his successor in office, or to the person or party entitled thereto, then this obligation to be void, otherwise to be and to remain in full force and virtue";

(3) Neither petitioner anywhere denies the allegation in respondent's petition that "the said Jesse L. Pearl, defendant, * * * failed and neglected to deliver to his successor the balance of the funds in his possession, to wit, $22,751.59; at no time since the third day of January, 1935, has the defendant Jesse L. Pearl, or the defendant Massachusetts Bonding & Insurance Company paid or delivered to the county of Garfield or the present County Treasurer of Garfield county said sum of $22,751.59 or any part thereof and said sum is now past due and wholly unpaid";

(4) Neither petitioner anywhere alleges that any securities or value of any kind have at any time been turned over by petitioner Pearl, or by anyone acting in

his behalf, to the county of Garfield or anyone acting in its behalf, in lieu of the said sum of $22,751.59, or any part thereof;

(5) Both petitioners seek to escape liability on their bond on the ground of fraud, specifically on the ground that the Commissioners of the county of Garfield concealed from the petitioner Bonding Company the fact that they were about to make an illegal designation of depositories; they do not therefore deny that the attempted designation of depositories by the County Commissioners was illegal; they do not allege that said illegal designation was made *after* the bond was filed; they do not deny that petitioner Pearl had full knowledge that the illegal designation was about to be made even before he took his oath of office; their amended answers (Tr. p. 15 and p. 21, Par. IV) allege: "Further answering, defendant alleges that neither of said banks was able to procure a depository bond as required by statute and neither of said banks was able to furnish the character of security for county deposits specified in the statute, and *the said County Board was so advised by the said Jesse L. Pearl prior to the delivery of the bond herein involved. Said facts, however, were not known to this defendant,*" neither petitioner anywhere alleges any actual misrepresentation of fact by the County Commissioners or by anyone else, they rely at most upon a tacit misrepresentation with respect to future conduct; neither petitioner makes any allegation of fact to support his bare statement that the bond would not have been executed had the contemplated (future) conduct of the Board of Commissioners been known;

(6) Both petitioners seek to escape liability on their bond on the ground of estoppel, specifically on the ground that as the Commissioners of the county of Garfield had designated (illegally) the banks as depositories, they cannot now be heard to assert that the designation was illegal; but neither petitioner anywhere denies that the entire loss sustained by the county of Garfield was occasioned entirely by reason of the fact that the customers' notes given by the banks as collateral proved, in whole or in part, worthless; neither petitioner anywhere denies that the resolution of the County Board designating the banks as depositories required them to submit the customers' notes to petitioner Pearl, as County Treasurer, for approval; and that if he had not approved these worthless notes the county would have sustained no loss;

(7) Both petitioners seek to escape liability on their bond on the ground that petitioner Pearl, as County Treasurer, had no choice but to comply with the order of the Board to deposit County funds in the illegally designated depositories; but again neither petitioner denies that the resolution of the County Board designating the banks as depositories required them to submit the customers' notes to petitioner Pearl, as County Treasurer, for approval; and accordingly that petitioner Pearl was by no means caught on the horns of a dilemma—to escape his present difficulty he need only have disapproved the notes tendered as security by the banks.

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THE DECISION OF THE SUPREME COURT OF NEBRASKA

The law with respect to the liability of a County Treasurer and of his bondsmen as pronounced by the Supreme Court of Nebraska in the instant case is sufficiently disclosed in the syllabus (by the court), which is here set out complete (Tr. p. 31):

"(1) A county treasurer is an insurer of the funds that come into his hands by virtue of his office, and he and his bondsmen are liable for moneys lost by the failure of the banks in which moneys of the county are deposited, except where deposits are made in conformity with the depository act. Thomsen v. Hall County, 63 Neb. 777, 89 N. W. 389.

"(2) A county treasurer must account absolutely for all funds lost in an insolvent bank, where the bank is not a validly designated depository or where the deposit is otherwise unauthorized by law.

"(3) Where a county treasurer's bond is conditioned upon the faithful performance by him of the duties of the office, the sureties on the bond are bound in like manner, and their responsibility is the same as that of their principal.

"(4) While county officers are presumed to have acted within their authority, statutes delegating powers to county officers must be strictly construed, and all persons dealing with public officers must inform themselves as to their authority, and acts which are within the apparent, but in excess of the actual, authority of officers will not bind the government which they represent.

"(5) 'Powers conferred upon a public officer can be exercised only, in the manner, and under the circumstances, prescribed by law, and any attempted exercise thereof in any other manner or under different circumstances is a nullity.' 46 C. J. 1033.

"(6) It is no defense for either a county treasurer or surety on his bond, in any action on

the bond to recover public funds predicated on an alleged failure of the treasurer to account for or pay them over, that the funds have been lost without the fault or negligence of the county treasurer."

The contention of petitioners that the conduct of the County Commissioners of Garfield county amounted to constructive fraud and resulted in an estoppel in pais was disposed of by the court in the following language (Tr. p. 39):

> "The amended petition of the county is sufficient in form to disclose that the county treasurer failed to turn over to his successor at the end of his term the amount of money involved in this action. Under the authorities as herein announced, the defendants cannot prevail.
>
> "The defendants contend that estoppel in pais applies; that the defense of equitable estoppel may be asserted, and the conduct of the county commissioners constitutes constructive fraud. The applicability of the foregoing authorities to the circumstances of this case, as disclosed by the pleadings, makes the defendants' contention in this respect untenable."

———o———

QUESTIONS PRESENTED

In the present proceeding in which petitioners seek in this Court a writ of certiorari, petitioners contend: (1) that the construction thus placed by the Supreme Court of Nebraska upon Sections 77-2506 to 77-2513, inclusive, Compiled Statutes of Nebraska, 1929, is in contravention of the Fifth Amendment and Section One of the Fourteenth Amendment of the Constitution of the United States, in that it confiscates, without due process of law, the private property of the defendant County Treasurer

and his bondsman; (2) that the construction thus placed by the Supreme Court of Nebraska upon Sections 77-2506 to 77-2513, inclusive, above referred to, violates Section 10, Article 1 of the Constitution of the United States, because it impairs the obligation of the bond contract, in that whereas it is agreed in the bond that if the Treasurer performs the acts required of him by law there shall be no liability on the part of himself or his bondsman, the decision imposes liability upon him and his bondsman regardless of compliance with the law.

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POINT A

This Court will not review and revise the construction affixed to a state statute as to a question of local law by the court of last resort of the state.

The language of this Court in *Erie Railroad Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, is as follows:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."

And in *Ruhlin v. New York Life Insurance Co.,* 304 U. S. 202, 82 L. Ed. 1290, this Court said:

> "The decision in *Erie R. Co. v. Tompkins* * * * settles the question of power. The subject is now to be governed, even in the absence of state statute, by the decisions of the appropriate state court."

In the light of the above well known decisions by this Court, any attempt on the part of petitioners to show that either the legislature of the state of Nebraska

or the Supreme Court of Nebraska entertained a merely erroneous view of the liability of County Treasurers and/or their bondsmen must be wholly abortive. Unless, therefore, they can demonstrate wherein the Statutes of Nebraska or the interpretation thereof by the Supreme Court of Nebraska is in some way violative of their rights under the Constitution of the United States, specifically, as they contend, of their rights under the Fifth and Fourteenth Amendments and Section 10, Article 1, thereof, they can have little standing in this Court.

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POINT B

Petition herein for writ of certiorari should be denied as it fails to show that any rights of petitioners under the Constitution or laws of the United States have been impaired.

It will not escape the notice of this Court that petitioners have wholly failed to cite a single decision by this Court in support of their contention that their rights under the Fifth or Fourteenth Amendment, or under Section 10, Article 1, have been impaired. The reason they do not cite such decisions is of course simply that they cannot. There are no such decisions. And the reason, respondent respectfully submits, that petitioners can cite no such authorities is

POINT C

The decisions of this Court are in complete harmony with the views of the Supreme Court of Nebraska as expressed by the latter in the case at bar.

The propositions of law as laid down by this Court with respect to the various aspects of the present controversy are as follows:

Proposition I. The liability of a receiver of public moneys is to be determined, not by the law of bailments, but by the terms of his contract. U. S. v. Prescott, 44 U. S., 3 How. 578, 11 L. ed. 734; *U. S. v. Dashiel,* 71 U. S., 4 Wall. 182, 18 L. ed. 319; *Boyden v. U. S.* 80 U. S., 13 Wall. 17, 20 L. ed. 527; *U. S. v. Keehler,* 76 U. S., 9 Wall. 88, 19 L. ed. 576.

In the *Prescott* case, *supra,* this Court used the following language:

> "This is not a case of bailment, and consequently, the law of bailment does not apply to it. The liability of the defendant, Prescott, arises out of his official bond, and principles which are founded upon public policy. The conditions of the bond are, that the said Prescott has 'truly and faithfully executed and discharged, and shall truly and faithfully continue to execute and discharge, all the duties of said office,' (of receiver of public moneys at Chicago), 'according to the laws of the United States; and moreover has well, truly and faithfully, and shall well, truly, and faithfully, keep safely, without loaning or using, all the public moneys collected by him, or otherwise at any time placed in his possession and custody, till the same had been or should be ordered, by the proper department or officer of the government, to be transferred or paid out; and when such orders for transfer or payment had been or should be received, had faithfully and promptly made,

and would faithfully and promptly make, the same, as directed,' &c.

"The condition of the bond has been broken, as the defendant, Prescott, failed to pay over the money received by him, when required to do so; and the question is, whether he shall be exonerated from the condition of his bond, on the ground that the money had been stolen from him?

"The objection to this defence is, that it is not within the condition of the bond; and this would seem to be conclusive. The contract was entered into on his part, and there is no allegation of failure on the part of the government; how, then, can Prescott be discharged from his bond? He knew the extent of his obligations, when he entered into it, and he has realized the fruits of this obligation by the enjoyment of the office. Shall he be discharged from liability, contrary to his own express undertaking? There is no principle on which such a defence can be sustained. The obligation to keep safely the public money is absolute, without any condition, express or implied; and nothing but the payment of it, when required, can discharge the bond. * * *

"The case of *Foster et al v. The Essex Bank*, 17 Mass. 479, was a mere naked bailment, and of course does not apply in principle to this case. The deposit in that case was for the accommodation of the depositor, and without any advantage to the bank, as the court say, 'which can tend to increase its liability. No control whatever of the chest, or of the gold contained in it, was left with the bank or its officers. It would have been a breach of trust to have opened the chest, or to inspect its contents.'

"Public policy requires that every depository of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that 'he should keep safely' the moneys which come to his hands. Any relaxation of this condition would open the door to frauds, which might be practised with impunity. A deposi-

tary would have nothing more to do than to lay his plans and arrange his proofs, so as to establish his loss, without laches on his part. Let such a principle be applied to our postmasters, collectors of the customs, receivers of public moneys, and others who receive more or less of the public funds, and what losses might not be anticipated by the public? No such principle has been recognized or admitted as a legal defence. And it is believed the instances are few, if indeed any can be found, where any relief has been given in such cases by the interposition of Congress.

"As every depository receives the office with a full knowledge of its responsibilities, he cannot, in case of loss, complain of hardship. He must stand by his bond, and meet the hazards which he voluntarily incurs.

"The question certified to us is answered, that the defendant, Prescott, and his sureties, are not discharged from the bond, by a felonious stealing of the money, without any fault or negligence on the part of the depositary; and, consequently, that no such defence to the bond can be made."

And the syllabus in the case reads:

"The felonious taking and carrying away the public moneys in the custody of a receiver of public moneys, without any fault or negligence on his part, does not discharge him and his sureties, and cannot be set up as a defence to an action on his official bond."

In the *Dashiel* case, *supra,* the first paragraph of the syllabus reads:

"The loss of public money by a receiver and disburser of it, through felonious taking away, though without fault on his part, does not discharge him or his sureties from obligation on his official bond."

In the *Boyden* case, *supra,* the first paragraph of the syllabus reads:

> "A receiver of public moneys of the United States does not stand in the position of an ordinary bailee; he is bound to higher responsibility. Upon a suit, therefore, on a bond 'for the faithful discharge of his trust,' such a receiver cannot discharge himself by showing that he was suddenly beset in his office, thrown down, bound, gagged, and that against all defence he could make the money was violently and without his fault taken from him."

In the *Keehler* case, *supra,* the third and fourth paragraphs of the syllabus read:

> "A depository of the money of the United States or a public debtor, cannot defend against a suit on his official bond by proving that he paid the money due the United States to one of its creditors, under an order of the Confederate authorities, where he shows no force or physical coercion which compelled obedience to such order.
>
> "In a suit on an official bond the obligation is not that of a mere depositary, but of a person who has made a contract, which he must at his own peril perform."

In the case of *State v. Bodleter, et al,* 86 N. W. 461 (Minn., June, 1901), the Court held "the State Treasurer and his sureties upon his official bond are liable to the state on account of and for all moneys deposited by said treasurer in banks or with bankers selected by him in accordance with" Gen. St. 1894, Sec. 344, subd. 2. Commenting on the numerous decisions of this Court on the subject of the receivers of public moneys, the Supreme Court of Minnesota stated: "At that time, and until the enactment of an amendatory act, it may safely be assumed that the State Treasurer was responsible, abso-

lutely, for the safekeeping of all public moneys that might come into his hands. He was then charged * * * as he now is * * * with safely keeping all public moneys which were paid into the State Treasury, and, under the decisions, this liability was unquestionable, except, probably, in cases of loss by the act of God or the public enemy. The ground upon which this doctrine of absolute responsibility is placed was satisfactorily stated in *U. S. v. Prescott (supra);* and the rule as then announced was of general application for many years throughout the United States. It was not questioned anywhere, and, as a proposition of law, is not now, in cases where the duty to safely keep public funds is imposed upon a public officer without any qualification whatever, express or implied. Later, in the case of *U. S. v. Thomas,* 15 Wall. 337, 21 L. Ed. 89, it was held that a collector of public money was discharged from liability on account of a seizure of the same by an army of the Confederate states, in time of war; such seizure being without negligence or fault of such collector. The position taken by the Court in this case was that the collector was absolved from liability because prevented from paying over the money by the act of a public enemy. Obviously, it was not intended to overrule, but to distinguish, the *Prescott* case before mentioned."

It is true that the line of cases above quoted involving decisions by this Court do not touch upon the provisions of the Federal Constitution, but it will be observed that petitioners are contending that a decision by the Supreme Court of Nebraska holding petitioners liable on an official bond by reason of losses sustained through the treasurer's own act of approving worthless custom-

ers' notes constitutes a deprivation of property without due process of law.

Are petitioners willing to be understood as contending that this entire series of decisions by the Supreme Court of the United States constitutes a deprivation of property without due process of law?

Proposition II. The government is not responsible for the laches or the wrongful acts of its officers; and, where it takes an official bond, the obligors are conclusively presumed to execute it with a full knowledge of that principle of law, and to consent to be dealt with accordingly. Hart v. United States, 95 U. S. 316; *Gibbons v. United States,* 8 Wall. 269; *United States v. Kirkpatrick,* 9 Wheat. 720, *United States v. Vanzandt,* 11 Wheat. 184; *United States v. Nicholl,* 12 Wheat. 505; *Jones, et al v. United States,* 18 Wall. 662.

The opinion of this Court in the *Hart* case, *supra,* reads as follows:

> "This suit was brought by the United States, May 29, 1872, against Hosmer, Hart, and Stahl, on a distiller's bond, executed by them May 29, 1871, in the sum of $5,000, and conditioned to be void if said Hosmer should faithfully comply with all the provisions of law relating to the duties and business of distillers, and pay all penalties incurred or fines imposed on him for a violation of any of said provisions, and should not suffer the tract or lot of land on which the distillery stood, or any part thereof, to be incumbered by mortgage, judgment, or other lien during the time in which he should carry on said business.
>
> "The breach alleged was the non-payment by said Hosmer of $3,000, demanded of him, being the amount of tax on six thousand gallons of spirits,

which he had distilled after the first day of June, 1871. He made no defence. The other defendants filed three pleas: 1. That the bond was never delivered to the plaintiff; that the assessor had no authority of law to approve it; and that neither the collector nor any other officer of the plaintiff had authority to receive it. 2. That the bond was a common distiller's bond, and that they signed it merely as sureties for Hosmer, without consideration, and for his accommodation; *that, six days before its execution, Hosmer, without their knowledge,* incumbered the ground upon which the distillery stood, by his mortgage of the same to one Dempsey, which was duly recorded May 25, 1871; that the plaintiff did not require, nor did Hosmer file with the assessor, the written consent of Dempsey that the lien of the United States for taxes and penalties should have priority to the mortgage, and that the title should, in case of forfeiture, vest in the United States, discharged of said mortgage; nor was Hosmer required to, nor did he, execute an indemnity bond against said mortgage, as required by the act of Congress approved April 10, 1869, but *that the bond sued on was approved without the filing of such consent or taking of such indemnity bond;* that, by reason of the non-payment by Hosmer of the taxes on distilled spirits which were chargeable, and a lien upon said ground, a part of it was distrained and sold for $6,100, which sum, if the amount of Dempsey's mortgage had not been deducted therefrom, would have been sufficient to pay Hosmer's indebtedness to the United States. 3. That the taxes charged and sued for were assessed against Hosmer on spirits he had distilled, and were a first and paramount lien thereon; but *that the collector of internal revenue for the district, without the knowledge or assent of the defendants, and without first requiring the payment of the taxes thereon, permitted him to remove from the bonded warehouse, a quantity of said spirits,*—more than sufficient to pay any just claim of the plaintiff. (Italics supplied.)

"On motion of the plaintiff, all of the first plea, except so much as averred the non-delivery of the bond sued on, was stricken out. Demurrers to the second and third were sustained, whereupon the defendants excepted.

"The court found that the bond in suit was signed May 29, 1871; that it was, on the first day of June, handed by Hosmer to the deputy-assessor of internal revenue, to be transmitted to the assessor, by whom it was approved June 5, and then duly transmitted by mail to the collector of the district.

"There was a judgment for $3,048.40, and costs.

"The second defence relied upon in this case is disposed of by *Osborne v. United States,* 19 Wall. 577, which we are not inclined to reconsider.

"The third defence is equally bad. Under the law as it stood when this suit was commenced, no distilled spirits could be removed from a distillery warehouse before payment of the tax, 15 Stat. 130, sect. 15, without subjecting all those engaged in such a removal to heavy penalties, 15 Stat. 140, sect. 36. An officer of the United States had no authority to dispense with this requirement of the law. If in violation of his duty he permitted such a removal, he subjected himself to punishment, but did not bind the government by his acts. The government is not responsible for the laches or the wrongful acts of its officers. * * * Every surety upon an official bond to the government is presumed to enter into his contract with a full knowledge of this principle of law, and to consent to be dealt with accordingly. The government enters into no contract with him that its officers shall perform their duties. A government may be a loser by the negligence of its officers, but it never becomes bound to others for the consequences of such neglect, unless it be by express agreement to that effect. Here the surety was aware of the lien which the law gave as security for the payment of the tax. He also knew that, in order to retain this lien, the government must rely upon the

diligence and honesty of its agents. If they performed their duties and preserved the security, it inured to his benefit as well as that of the government; but if by neglect or misconduct they lost it, the government did not come under obligations to make good the loss to him, or, what is the same thing, release him pro tanto from the obligation of his bond. As between himself and the government, he took the risk of the effect of official negligence upon the security which the law provided for his protection against loss by reason of the liability he assumed.

"There was no error in striking out that portion of the first defence which was objected to. It was not responsive to any allegation in the petition."

And the syllabus in the case in part reads:

"2. The United States is not responsible for the laches or the wrongful acts of its officers; and, where it takes an official bond, the obligors are conclusively presumed to execute it with a full knowledge of that principle of law, and to consent to be dealt with accordingly."

In the *Kirkpatrick* case, *supra,* the syllabus in part reads:

"In general, *laches* is not imputable to the government; and where the laws require quarterly or other periodical accounts and settlements, a mere omission to bring a suit, upon the neglect of the officer or agent to account, will not discharge his sureties."

In the *Vanzandt* case, *supra,* the syllabus in part reads:

"The case of the *United States v. Kirkpatrick,* 9 Wheat. 720, reviewed, its authority confirmed, and applied to the present case.

"An omission of the proper officer to recall a delinquent paymaster under the injunctions of the

4th section of the act of the 24th of April 1816, c. 69, does not discharge his surety.

"The provisions requiring the delinquent paymaster to be recalled, and a new appointment to be made in his place, are merely directory, and intended for the security of the government; but form no part of the contract with the surety.

"The statute not removing from office the delinquent paymaster, *ipso facto,* but only making it the duty of the proper officer to remove him, the circumstance of new funds being placed in his hands, after his delinquency, does not discharge the surety."

And in its opinion (p. 188), this Court said:

"The attempt to distinguish this from *Kirkpatrick's Case,* is made upon the ground, that that was purely a case of *laches,* whereas, in this, an *unauthorized act was done by the government in confiding funds to the disposal of a public defaulter, whom the government was bound by law to have dismissed from office.* But will it be contended, that the obligation to dismiss this officer was more imperative than that imposed upon the comptroller to call the collector of direct taxes to account, at the periods prescribed by law, and in cases of delinquency, to pursue the summary remedy which the same law provided for the public, and, consequently, for that of the surety? The neglect in the one case, and in the other, imputes *laches* to the officer whose duty it was to perform the acts which the law required; but in a legal point of view, the rights of the government cannot be affected by these *laches.* The provisions in both laws are merely directory to the officers, and intended for the security and protection of government, by insuring punctuality and responsibility; but they form no part of the contract with the surety. If, then, the paymaster continues in office, notwithstanding the omission of the proper officer to recall him on the ground of his defaults, the act of placing funds in his hands, to be dis-

bursed according to law, is not one of which the surety can complain, since the public interest requires that the troops should be paid, which can be done only by the officer appointed for that purpose. If the neglect of the officers of government, from which the surety suffers, does not discharge him from his responsibility in either case, it is not perceived how the placing funds in the hands of the paymaster, who continues in office, can have that effect, seeing that the latter circumstance is the necessary consequence of the former." (Italics supplied.)

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POINT D

Article 1, Section 10, United States Constitution, providing that no state shall pass any "law impairing the obligation of contracts," relates only to the impairment of contracts by legislation, and not by judgments of the courts.

This point has been repeatedly decided by this Court. *Commercial Bank v. Buckingham's Executors,* 5 How. 317, 343, 12 L. Ed. 169; *Railroad Company v. McClure,* 10 Wall. 511, 19 L. Ed. 997; *Knox v. Exchange Bank,* 12 Wall. 379, 383, 20 L. Ed. 287; *Lehigh Water Co. v. Easton,* 121 U. S. 388, 7 Sup. Ct. 916, 30 L. Ed. 1059; *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.,* 125 U. S. 18, 30, 8 Sup. Ct. 741, 31 L. Ed. 607; *Brown v. Smart,* 145 U. S. 454, 458, 12 Sup. Ct. 958, 36 L. Ed. 773; *Central Land Co. v. Laidley,* 159 U. S. 103, 111, 112, 16 Sup. Ct. 80, 40 L. Ed. 91; *Bacon v. Texas,* 163 U. S. 207, 221, 223, 16 Sup. Ct. 1023, 41 L. Ed. 132; *Hanford v. Davies,* 163 U. S. 273, 278, 16 Sup. Ct. 1051, 41 L. Ed. 157; *Turner v. Wilkes Co.,* 173 U. S. 461, 463, 19 Sup. Ct. 464, 43 L. Ed. 768; *National Association v. Brahan,* 193 U. S. 635, 647, 24 Sup. Ct. 532, 48 L. Ed.

823; *Hubert v. New Orleans,* 215 U. S. 170, 175, 30 Sup. Ct. 40, 54 L. Ed. 144; *Fisher v. New Orleans,* 218 U. S. 438, 31 Sup. Ct. 57, 54 L. Ed. 1099; *Cross Lake Shooting & Fishing Club v. Louisiana,* 224 U. S. 632, 638, 32 Sup. Ct. 577, 56 L. Ed. 924; *Ross v. Oregon,* 227 U. S. 150, 161, 33 Sup. Ct. 220, 57 L. Ed. 458, Ann. Cas. 1914C, 224; *Kryger v. Wilson,* 242 U. S. 171, 177, 37 Sup. Ct. 34, 61 L. Ed. 229; *Rooker v. Fidelity Trust Co.,* 261 U. S. 114, 118, 43 Sup. Ct. 288, 67 L. Ed. 556; *Columbia Ry. v. South Carolina,* 261 U. S. 236, 43 Sup. Ct. 306, 67 L. Ed. 629; *Tidal Oil Co., et al v. Flanagan,* 44 Sup. Ct. 197, 263 U. S. 444, 68 L. Ed. 382; *Fleming, et al v. Fleming,* 44 Sup. Ct. 246, 264 U. S. 29, 68 L. Ed. 547.

In *Tidal Oil Co., et al v. Flanagan, supra,* the syllabus in part reads:

> "Cons. art. 1, Section 10, providing that no state shall pass any 'law impairing the obligation of contracts,' relates only to the impairment of contracts by legislation, and not by judgments of the courts."

In the *Fleming Case, supra,* the syllabus in part reads:

> "Cons. art. 1, Section 10, prohibiting impairment of contracts, is directed only against impairment by legislation, and a judicial decision reversing former decisions does not present a federal question, of which the United States Supreme Court can take jurisdiction on a writ of error from a state court, though the question involved related to the construction of a statute."

And the opinion in that case in part reads:

> "It is assigned for error that in this ruling the Supreme Court of the state reversed its former rulings, under which such a contract of partnership had been held to be valid, and not avoided by sec-

tion 3376 or any other section of the Code, that on the faith of these rulings the partnership contracts herein had been entered into, and an impairment of the contracts of partnership in violation of article 1, Section 10, of the federal Constitution. * * *

"In *Tidal Oil Co. v. Flanagan,* 263 U. S. 444, 44 Sup. Ct. 197, 68 L. Ed. ....., decided January 7, 1924, we had occasion to consider the same issue. After a somewhat full examination, we held that by a score of decisions of this court a judicial impairment of a contract obligation was not within section 10, art. 1, of the Constitution, since the inhibition was directed only against impairment by legislation, and that such judicial action presented no federal question of which this court could take jurisdiction on a writ of error from a state court.

"It is urged upon us that the impairment here is legislative, in that the case turned on the effect of section 3376 of the Iowa Code; that the subsequent judicial construction of it became part of the statute and gave it a new effect as a law. In other words, the contention is that the same statute was one law when first construed before the making of the contract and has become a new and different act of the Legislature by the later decision of the court. This is ingenious but unsound. It is the same law. The effect of the subsequent decisions is not to make a new law, but only to hold that the law always meant what the court now says it means. The court has power to construe a legislative act, but it has no power by change in construction to date its passage as a law from the time of the latter decision. A statute in force when a contract was made cannot be made a subsequent statute through new interpretation by the courts. Any different view would be at variance with the many decisions of this court cited in the Flanagan Case.

"For these reasons, we must hold that the claim of plaintiff in error does not raise a substantial fed-

eral question, and dismiss the writ of error for lack of jurisdiction."

In the *Columbia Ry. Case, supra,* the syllabus in part reads:

"The Constitution affords no protection as against impairment of a contract by judicial decision."

And the opinion in that case in part reads:

"As this court has repeatedly ruled, the Constitution affords no protection as against an impairment by judicial decision.

"If, therefore, the judgment, although in effect impairing the obligation of the contract, nevertheless proceeds upon reasons apart from and without giving effect to the statute, this court is without jurisdiction to review it. *Bacon v. Texas,* 163 U. S. 207, 216, 16 Sup. Ct. 1023, 1027 (41 L. Ed. 132), wherein the doctrine is stated as follows: 'Where the federal question upon which the jurisdiction of this court is based grows out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired within the meaning of this clause in the Constitution, and so as to give this court jurisdiction of writ of error to a state court, by some subsequent statute of the state which has been upheld or effect given.' "

In their petition for a writ of certiorari filed herein, petitioners say:

"The statutes involved are a portion of the Depository Law of the State of Nebraska. Specifically they are Sections 77-2506, 77-2508, 77-2513, 77-2511 and 77-2512, Compiled Statutes of Nebraska, *1929"* (page 2).

And on page 4 of their petition, petitioners say:

"Your petitioners filed a Motion for Rehearing upon the grounds, amongst others, that as construed

> by the Court, Sections 77-2506, 77-2508 and 77-2513" —that is to say, of the Compiled Statutes of Nebraska, *1929*—"were confiscatory and violated the due process and contract clauses of the Federal Constitution."

And in its amended answer (Tr. p. 14, Par. II) petitioner Massachusetts Bonding & Insurance Company alleged:

> "II. Defendant admits that on January 5, 1931 the defendant, Jesse L. Pearl, as principal, and this defendant, as surety, executed the official bond in the sum of $20,000.00, copy of which is attached to plaintiff's petition and marked Exhibit A."

Substantially the same allegation is made in the amended answer of petitioner Pearl (Tr. p. 20, Par. II). In short, neither petitioner anywhere pretends that any legislation of any kind whatever has been enacted in Nebraska at any time subsequent to the execution and filing of the bond in issue. How can petitioners contend that the State of Nebraska "passed any law impairing the obligation of their contract?"

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POINT E

Where the parties to an action were fully heard in a State Supreme Court, in the regular course of judicial proceedings, the Court's reversal of a former decision to the prejudice of a party does not constitute the taking of such party's property without due process of law, in violation of Constitutional Amendment 14.

This proposition is substantially the wording of the syllabus in *Tidal Oil Co. v. Flanagan, supra.* In that case, this Court, speaking through Mr. Chief Justice Taft, declared:

> "The mere reversal by a State Court of its previous decision, as in this case before us, *whatever its effect upon contracts,* does not, as we have seen, violate any clause of the federal Constitution. Plaintiff's claim, therefore, does not raise a substantial federal question. This has been decided in so many cases that it becomes our duty to dismiss the writ of error for want of jurisdiction."

It will be observed that petitioners do not even contend that the Supreme Court of Nebraska has reversed itself in the decision in the instant case. The Supreme Court of Nebraska has pointed out in the decision rendered herein that it was merely following well established law in the State of Nebraska. It is apparent that in the last analysis the sole basis of petitioners' application to this Court is simply that they regard the decision of the Supreme Court of Nebraska as in some vague way "unfair." To substantiate this position they refer this Court to two decisions only, handed down in the one instance by the Supreme Court of North Dakota, and in the other by the Supreme Court of Mississippi.

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POINT F

The cases cited by petitioners have no bearing on the present action.

Petitioners rely upon (entirely) *Board of Education v. Nelson,* 157 N. W. 664 (N. D.); *McGee v. Brister,* 68 So. 77 (Miss. 1915).

Board of Education v. Nelson, 157 N. W. 664 (N. D.). How inapplicable the case is to the one at bar is apparent from the syllabus (the italics have been supplied), here set out in full:

"Action at law to recover of the Rugby school district treasurer and sureties on his official bond for a balance of $2,521 and interest, lost by the district through the failure of its depository, the defunct First National Bank of Rugby. Held:

"(1) That the treasurer, in depositing the school funds therein upon order of the district board and *in compliance with the statutes,* is not liable upon his official bond, where the school funds are lost to the district.

"(2) The designation of depositaries and requiring of bonds from them was the duty and province of the school board, not the treasurer.

"(3) *Under the record* the treasurer was justified in *assuming* that the board had complied with the law in the designating of depositaries, and had exacted sufficient depositary bonds.

"(4) The original designation of depositaries in 1905 *was sufficient to continue said bank as a legal depositary,* and without a redesignation in July 1907.

"(5) The loss arises principally from the deposit of a sinking fund as to which the school board *is empowered to order a deposit to be made in any depositary therefor,* and which depositary may be designated after advertisement and at any time. The treasurer had the right to rely upon the presumption that said bank had been designated as a depositary for such funds.

"(6) School treasurers have not the control of the district funds, except in a limited way for the purpose of depositing them in depositaries selected by the board. The authority over school funds is with the district board since the enactment of depositary statutes, and since which time the treasurer is no longer an insurer of the return of school funds to the district after their deposit *as provided by law.*

The facts exonerate the treasurer and his bondsmen from liability.

McGee v. Brister, 68 So. 77 (Miss. 1915). The syllabus in this case reads:

"The Legislature may not practically abolish an office created by the Constitution, as by preventing its incumbent from discharging the duties necessarily appertaining thereto, although it may within certain limits prescribe the duties of such an office.

"Laws 1910, c. 137, provides for the establishment of county and drainage district depositories, and that county treasurers shall deposit county moneys therewith. *Held,* that the statute is not unconstitutional, as practically abolishing the office of county treasurer, established by Const. No. 135, and as violating section 267, providing no person elected or appointed to any office under the laws of the state shall hold such office without devoting his time to the performance of its duties.

"*Held,* that the statute is not invalid, as rendering county treasurers absolute insurers of county moneys, when all control over them is vested in the depositories, since the depository law has altered the responsibility of such treasurers, so that they cannot be held insurers of the safety of the funds.

"*Held,* that the statute is not invalid, as subjecting county treasurers to liabilities growing out of the receipt and disbursement of county funds, since the act has largely modified the duties of county treasurers, as prescribed by sections 978 and 983 of the Code of 1906, regulating the duties of such officers, *leaving such officers as have complied with its provisions* under no liabilities springing from such receipts and disbursements."

The *McGee* case, *supra,* gives no facts involving the question of a treasurer's liability under the depositary law in Mississippi. It does not set out the statute in

question. Petitioners give neither the facts nor the statute, but seem to rely entirely on the propositions of law above quoted. Respondent has no quarrel with those propositions. It is not contended here that a treasurer is or ought to be an insurer *when he complies with the depositary law.* The Supreme Court of Nebraska has not in this case nor in any other case taken such a position.

CONCLUSION

We respectfully submit that petitioners, under the facts relied upon by them in their amended answers, should not be permitted to escape liability on a bond which they had posted with the express intent and purpose of protecting the people of Garfield County against loss in the handling of public funds, and that the decisions of the District Court of Garfield County and of the Supreme Court of Nebraska, to the effect that petitioners had no defense, were in all respects correct and should not be disturbed.

We respectfully represent that the case is not a proper one for review by certiorari because the record further shows:

1. That questions only of state law were raised;

2. That the decisions of the Supreme Court of Nebraska upon such questions are all adverse to petitioners;

3. That no remote Federal question is involved;

4. That no constitutional rights of petitioners have in any way been impaired;

5. That no question of peculiar gravity or of national importance or consequence is involved;

6. That petitioners have been able to cite not a single authority, Federal, Nebraska, or otherwise that supports their application for the writ.

Respectfully submitted,

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